IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

JUDGMENT

Ram Chandra Das & ors. Vs. Smt.Kaushalya Devi & ors.

S.B.CIVIL MISC. APPEAL NO.327/1994

Against the award dated 23.02.1994 made by the Motor Accidents Claims Tribunal, Bhilwara in Claim Case No.160/1992 (168/1987).

Date of Judgment : 18th December 2006

PRESENT

HON'BLE MR.JUSTICE DINESH MAHESHWARI

Mr. Arvind Samdariya for the appellants
Mr. R.K.Mehta for the respondent No.3.

BY THE COURT:

This appeal has been preferred by the claimants against the award dated 23.02.1994 made by the Motor Accidents Claims Tribunal, Bhilwara in Claim Case No.160/1992 (168/1987) whereby the Tribunal has proceeded to reject their claim application seeking compensation on account of accidental death of Prabhulal (about 39 years) son of appellant No.1, husband of appellant No.2 and father of appellants Nos.2 to 5 on the finding that the claimants have failed to establish the fundamental fact that the victim died for the injuries sustained in vehicular accident as alleged.

The claimants, parents, wife and children of the victim Prabhulal Vaishnav filed the claim application on 22.09.1987 under Sections 110-A and 92-A of the Motor Vehicles Act, 1939 ('the Act of 1939') against Kaushalya Devi and Ladulal, non-applicants No.1 and 2 respectively, stating the non-applicant No.1 to be the owner of a bus bearing registration No.RSE 1529 being plied under the management and control of the non-applicant No.2. Paragraph 9(2) in the claim application about driver of the said vehicle was left blank. However, the insurer of the vehicle, United India Insurance Company was impleaded as party to the claim application upon its application dated 02.06.1989. The claimants alleged that the accident in question occurred on 01.07.1987 in front of Vardhman School on Jawaharlal Nehru Road in the City of Bhilwara. It was averred that the vehicle driver and conductor were transporting a marriage party taking the passengers inside and so also on the rooftop of the said bus from Bhilwara to Paroli; the bus driver was driving rashly and negligently; on Nehru Road near Ramdwara Triangle, the bus was taken close to a road side 'Babool' tree whose branches were hanging on the road; that the photographer Prabhulal riding on the roof of the bus was hit by the branches of the said 'Babool' tree; he fell down and sustained injuries on the head and back

bone; he was removed immediately to Mahatma Gandhi Hospital, Bhilwara where he succumbed to the injuries on 09.07.1987. Stating monthly income of the deceased at Rs.2,500/- and his age at about 39 years, the claimants claimed compensation in the sum of Rs.7,33,000/- apart from Rs.15,000/- for no fault liability.

The claim application was contested by the non-applicants Nos.1 and 2 with the submissions that no such accident occurred on 01.07.1987 and denied the bus in question having taken any marriage party from Bhilwara to Paroli on 01.07.1987. It was asserted that on 01.07.1987 the said bus, plying on its route, started from Begun at 7.00 a.m. and reached Bhilwara at about 11.00 a.m.; that the bus never went to Ramdwara Triangle on Nehru Road, Bhilwara and hence there was no question of its brushing against 'Babool' tree; that there was no such tree on the alleged place of occurrence; that Prabhulal was never riding the said bus on the relevant date nor was hit by Babool branches and he never sustained any injury because of the use of the vehicle in question. The quantum of compensation claimed was also put to contention and it was also submitted that the vehicle in question was insured with the United India Insurance Company Ltd. Bhilwara and liability, if there be any, was of the insurer only. It was asserted that the claim application

was filed only in order to harass and pressurise the non-applicants and else no such accident took place at all. The insurer submitted a separate reply to the claim application denying the claim averments with further submissions that for his travelling on the roof of the bus, the deceased himself was responsible for the injuries and such travelling amounted to violation of policy conditions too. It was also submitted that even if the claimants were able to establish any liability in the insurer, such liability would not stand beyond Rs.15,000/-.

It may be pointed out that the Tribunal proceeded to dispose of the prayer for interim compensation under Section 92-A of the Act of 1939 by its order dated 15.02.1990 that reads as under:-

> "प्रार्थी वकील उपस्थित । अप्रार्थी सं. 1 व 2 की ओर से श्री सारस्वत एवं नं. 3 की ओर से नीलम बंसल उपस्थित। बहस 92 A के प्रार्थना पत्र सुना गया। यह स्वीकृत Position है कि दुर्घटना में प्रभुलाल की मृत्यु हुई है अत: no fault-liability के आधार पर प्रतिवादीगण के खिलाफ 15 हजार रूपये का अवार्ड पारित किया जाता है। इस रकम पर प्रार्थना पत्र प्रस्तुत करने की तिथी से 12% वार्षिक की दर से व्याज भी देय होगा। अब पत्रा. वास्ते वाद बिन्दु दिनांक 5/5/90 को पेश है।"

After making the aforesaid interim award for 'No Fault Liability'; the Tribunal framed the issues involved in the case on 31.07.1990 thus:

> "1.क्या जैसाकि आवेदन पत्र के चरण सं.10 में उल्लेख किया गया है, दि. 1.7.87 को श्री प्रभू लाल बस संख्या आर.एस.ई.

1529 की छत पर बैठ कर बरात में पारोली जा रहा था तो नेहरू रोड भीलवाड़ा रामद्वारा तिराहे पर बस चालक की असावधानी से दुर्घटना घटी जिसमें श्री प्रभूलाल का निधन हो गया।

2. आया वक्त दुर्घटना स्व. प्रभूलाल की आयु 39 वर्ष थी और वे 2500 रू. मासिक उपर्जन कर लेता था?
3. क्या आवेदकगण स्व.प्रभुलाल के उत्तराधिकारी एवं उत्तरजीवी है एवं उनके दुर्घटना में निधन से आवेदकगण को 7,33,000 रू. हानि पहुंची?
4. अनुतोष ?"

In oral evidence, the claimants examined Dr.K.C.Gaur who had conducted the post-mortem on 10.07.1987 as AW-1; Motilal, the then ASI at Police Station, Kotwali, Bhilwara as AW-2; Ram Chandra, father of deceased as AW-3; Kailash Chandra, an alleged occupant of the bus in question and a member of marriage party related to the marriage of his younger brother as AW-4; and Smt.Sayar wife of deceased Prabhulal as AW-5. The non-applicants on the other hand examined Ladulal non-applicant No.2, said to be managing the bus in question as NAW-1; Bhagwati Prasad, said to be the President of the Association of the transporters as NAW-2; and Babulal, said to be the conductor on the bus in question at the relevant time as NAW-3.

In documentary evidence, the claimants produced the post-mortem report dated 10.07.1987 as Ex.1, the FIR dated 13.08.1987 as Ex.2, site inspection report dated 14.08.1987 as

Ex.3, site plan prepared on 14.08.1987 as Ex.4. A ticket book said to be related with the bus in question got produced from the non-applicant Ladulal has been marked as Ex.A/5.

The learned Judge of the Tribunal after hearing the parties examined the fundamental question involved in the case in issue No.1 as to whether the deceased Prabhulal was travelling in the bus in question on 01.07.1987? It was contended in the first place on behalf of the claimants that the order for interim compensation having been made in this case on 15.02.1990, involvement of the bus in question in the accident was a fact already concluded and could not be taken up for consideration over again. This contention was rejected with reference to the order dated 15.02.1990 wherein no finding was recorded if the said bus RSE 1529 was at all involved in the accident.

The learned Judge thereafter proceeded to decide issue No.1 against the claimants on the considerations: (a) that according to the Dr.K.C.Gaur, AW-1 he had conducted post-mortem on 10.07.1987 but was not aware if the record of admission of the victim in the Orthopedic Department mentioned it to be a medico-legal case; and for an accident case, the duty doctor calls the medical jurist and the medical jurist calls the police; hence the medical jurist available 01.07.1987 was the only person in a position to say about

history given at the time of admission of the victim but such medical jurist was not produced in evidence; (b) that according to AW-2 Motilal, the Assistant Sub-Inspector at Kotwali, Bhilwara, telephonic information about accident was received by the Incharge of the Police Station on 09.07.1987 and this witness could not say if any information regarding the accident was received on 01.07.1987; (c) that AW-2 Motilal despite having received information on 09.07.1987 did not register first information report because it was not clear as to from which vehicle and where the accident occurred; and even before lodging of the first information report on 13.08.1987 investigation was undertaken; and only upon the statement of Kailash Chandra Baheti about involvement of the bus RSE 1529 that the first information report was registered; (d) that AW-4 Kailash Chandra Baheti, the alleged eye-witness was working as a Lower Division Clerk in the Irrigation Department and he was in the bus carrying marriage party of his brother and has stated to have got Prabhulal admitted to hospital but did not lodge any first information report that makes the entire case doubtful; (e) that the said witness Kailash Chandra Baheti stated that his father took the bus on hire from Ladulal but neither his father was produced in evidence nor any receipt in relation to such hiring was produced; (f) that the said witness AW-4 Kailash Chandra Baheti stated that

Prabhulal was taken to hospital by himself and his uncle Madanlal but the said uncle Madanlal was not produced in evidence; (g) that it appeared from the ticket book Ex.5 that the bus RSE 1529 came to Bhilwara from Begun on 01.07.1987; and it was not possible that the bus would have gone about 50 kms to Paroli, then having come back to Bhilwara and then having gone about 70-75 kms to Begun and then having come back from Begun; (h) that merely for filing of challan against the bus driver Udai Singh and pendency of criminal case, it could not be assumed that Prabhulal met with the accident from the same bus; (i) that there was no reason to disbelieve the statements of NAW-3 Babulal about the bus in question having started from Begun on 01.07.1987 at 7.15 a.m. and having reached Bhilwara at 11.15 a.m. and having gone again from Bhilwara to Begun at 3.15 p.m. and having not gone to any other place; and (j) that there was no reason to disbelieve the testimony of the witnesses produced by the non-applicants and their ticket-book Ex.5. Thus, it was concluded on issue No.1 that the claimants have failed to establish by reliable evidence that Prabhulal was travelling on the roof of the bus RSE 1529 on 01.07.1987 and the accident was caused by the said bus. In view of the conclusion on issue No.2, the learned Judge observed that other issues were not required to be considered and proceeded to reject the

claim application by the impugned award dated 23.02.1994. Hence this appeal.

It has been strenuously contended on behalf of the appellants that the learned Tribunal has erred in rejecting the claim application merely on surmises and conjectures; that the evidence produced by the claimants clearly establishes the fact that Prabhulal was traveling in the bus in question on 01.07.1987 and due to negligence of the driver he fell down the bus and sustained injuries leading to his death; that oral evidence adduced by the non-applicants is not trustworthy and the documentary evidence is wholly unreliable; and that adverse inference ought to have been drawn against the non-applicants for withholding of relevant evidence. It has also been contended that the order under Section 92-A of the Act of 1939 having been passed against the non-applicants on 15.02.1990 and having never been challenged, the non-applicants are estopped from questioning involvement of the vehicle in the accident. Learned counsel for the appellants has referred to the decisions in Brestu Ram Vs. Anant Ram and others: 1990 ACJ 333, Radha Kishan Sachdeva and others Vs. Flt. Lt. L.D.Sharma and another: 1994 ACJ 109 and Sitaramacharya Vs. Gururajacharya: 1997 DNJ (SC) 227. Per contra, learned counsel appearing for the insurer has duly supported the impugned award and submitted that the basic

facts about victim traveling in the bus in question and falling down for any negligence of the driver having not been established, the Tribunal has not erred in rejecting the claim application. It has also been submitted that in any case, the liability of the insurer in respect of the passenger of the vehicle does not exceed Rs.15,000/-. Learned counsel for the respondent has relied upon the decisions in Om Prakash Nayar Vs. National Productivity Council and others: 2001 ACJ 937 and Kamlesh and another Vs. Shyamlal and others: 2006 (1) TAC 926.

Submissions made by learned counsel for the parties have been given thoughtful consideration and the entire record has been scanned through. The basic question in this case remains as to whether the vehicle in question was involved in the accident as alleged?

So far the submission about the effect of the order made under Section 92-A of the Act of 1939 is concerned, the same is of no avail for the claimants. In this case, the Tribunal has proceeded to pass the said order dated 15.02.1990 in a wholly cursory manner where only this much has been stated that accidental death of Prabhulal was an admitted fact and, therefore, compensation was required to be awarded under 'No Fault Liability'. The fact as to whether such accidental death relates to the use of the vehicle in question has not

even been adverted to although the non-applicants Nos.1 and 2 had specifically denied the involvement of their vehicle. Hence, it cannot be accepted that merely for passing of the said order dated 15.02.1990, finding on involvement of the vehicle in question be treated fait accompli. The decision of the Hon'ble Supreme Court in Sitaramacharya (supra) relied upon by the learned counsel for the appellants about the effect of admission by a party in earlier proceedings has no application to the facts of the present case. There had not been any admission by the non-applicants for operation of the principles of estopple.

So far claimants' evidence is concerned, only AW-4 Kailash Chandra Baheti has been produced as the person directly in know of the facts. According to Kailash Chandra, the victim photographer Prabhulal was engaged for the purpose of marriage function; that Prabhulal fell down the bus RSE 1529; that it was the marriage party (barat) of his younger brother and he was also travelling in the bus that was taken on hire from Ladulal; that the marriage party was going back to Paroli from Bhilwara; that Prabhulal was on the roof of the bus with other passengers; that Prabhulal hit against a 'Babool' tree at Jawahar Road and fell down; that the road was of enough width and the driver could have negotiated the bus leaving the tree aside; that Prabhulal was taken to hospital

and later on he died. This witness has expressed ignorance about names of the bus driver and conductor. He has stated in cross-examination that he was sitting inside the bus; that no rates were settled with Prabhulal for photography and it was agreed that market rate would be charged; that he did not know the name of owner of the bus RSE 1529; that the bus was hired at Rs.1,000/- by his father who talked to Ladulal; that he was resident of Paroli and knew Radhey Shyam Gagrani (the witness denied any family dispute with him though admitted that there were no family interaction with Radhey Shyam's family); that the person who lent the bus on hire was brother-in-law of Radhey Shyam Gagrani; that hire charges were settled by his father only and receipt, if any, was also taken by his father. This witness has stated that photographer was taken in the bus at Roadways Bus Stand and that he got the victim admitted in the hospital after informing the fact about his falling from the roof of the bus. He has further stated that he did not inform the police and the victim was taken to hospital by himself and by his uncle Madanlal. He has not been able to state the height of 'Babool' tree and has denied the suggestion that he was making false deposition because of enmity with Radhey Shyam Gagrani and has denied the suggestion that the bus in question started at 7.00 a.m. from Begun and reached Bhilwara at

10.30 a.m. but has admitted the fact that the bus was plying from Begun to Bhilwara.

Ram Chandra AW-3, father of the deceased and Smt.Sayar Bai AW-5 wife of the deceased were not available at the site and their evidence is of no relevance on the question if Prabhulal was travelling in the bus in question and sustained injuries as alleged. However, Motilal AW-2 has stated that on 09.07.1987 when he was posted as ASI at Kotwali, Bhilwara, the Incharge received telephonic information about admission and demise of Prabhulal due to accident; that a report was noted in daily journal; as the particulars of offending vehicle were not known, first information report was not registered; and the same was registered on 13.08.1987 after his detecting out the facts. He has pointed out having prepared the inquest report of the dead body of Prabhulal on 10.07.1987 and of having prepared the site inspection report and site plan Ex.3 and Ex.4. In cross-examination, he has admitted that no date was stated on the first information report Ex.2 by him and stated that the case was handed over to him for investigation by Badri Narain. The witness admitted that upon receiving information about any incident, a first information report is registered in the first place and then investigation is undertaken but denied the fact that he first initiated the proceedings and then got registered

the first information report. The witness further stated that site plan was prepared as per the information given out by the witnesses; and that as per the statements of witnesses, he found the accident to have occurred from the said bus.

So far oral evidence is concerned, on behalf of the claimants, it is the witness Kailash Chandra Baheti AW-4 who has asserted that Prabhulal was riding the bus RSE 1529 on 01.07.1987 and sustained injuries because of the fall; and according to the witness Motilal AW-2 it appeared in his investigation on the basis of the statements of the witnesses that the accident occurred from the bus in question.

The documentary evidence of the first information report dated 13.08.1987 shows that upon receiving the information on 09.07.1987 from the duty doctor about admission of Prabhulal due to accident and his having expired, Motilal reached hospital and prepared inquest report and recorded the statements of witnesses including the witness Kailash Chandra Baheti who pointed out the cause of death of Prabhulal; and that Prabhulal was boarding the bus RSE 1529 when it was taken rashly and negligently resulting in the accident. From the evidence aforesaid, although it cannot be directly and definitely concluded that Prabhulal was riding the said bus RSE 1529 and sustained injuries because of the fall from the said bus but primary facts about involvement of

the bus in question have been stated particularly by the witness Kailash Chandra Baheti and have been corroborated by the witness Motilal, albeit on the basis of his investigation.

Though the evidence adduced by the claimants is of weak character, but it is noteworthy that a suggestion was made to the claimants' witness Kailash Chandra that he was deposing against the persons related with the bus on account of his enmity with Radhey Shyam Gagrani but such facts have not been stated in the reply and only this much has been stated that the claim was filed in conspiracy in order to harass and pressurise the non-applicants. Then, in the reply submitted by the insurer, the fact of Prabhulal travelling in the bus has not been denied and on the contrary it has been stated that accident occurred for Prabhulal travelling on the roof of bus and hence he sustained injuries for his own negligence. In the circumstances of the case, it appears necessary to examine the evidence led by the non-applicants.

Ladulal NAW-1 has stated that the bus RSE 1529 belonged to Kaushalya Devi and he was looking after the same since the year 1985; that the bus was plying on Bhilwara to Begun route on permit and was not plying on any other route; that the bus in question started at 7.00 a.m. on 01.07.1987 from Begun and reached Bhilwara at 10.30 a.m.; that he boarded the bus at village Gendaliya; that the bus went

again to Begun from Bhilwara at 3.15 p.m. and did not go anywhere else; that he knew Babulal Baheti of Paroli and marriage party of his son was never taken in the bus in question; that Mangilal was the conductor of the bus; the bus did not cause any accident; nobody in the name of Prabhulal fell from the bus; that the bus was detained by the police about 1 ¾ months later; that Bhagwati Prasad Ojha was the President of Association of the Bus Operators on Bhilwara-Begun route; that his in-laws were of Paroli and they had social enmity with the family of Babulal Baheti. In cross-examination by the claimants, Ladulal stated that Udai Singh was the driver of the bus on the relevant date and a case relating to the accident was pending against Udai Singh; that he was not aware if the doctor has given the information of the death of Prabhulal on 9th itself. He has further stated that 10 vehicles were plying on Begun-Bhilwara route with 9 timings; that the Association was settling rotation of the buses and a monthly chart was given to all the members; that he had destroyed the chart after the end of month and he was deposing on the basis of his memory and the averments in para 12 of the written statement (about the bus starting from Begun at 7.00 a.m. and reaching Bhilwara at 11.00 a.m.) were also stated on the basis of memory. He has also stated that he was not maintaining the account of profit-loss and income

from the bus; that the account of daily income was maintained by the conductor on a paper that was preserved by him; that taxes were also required to be paid every month at a definite amount. The witness stated that in the year 1987 they were not issuing tickets to all the passengers and were issuing only upon demand but then stated that all the passengers were issued tickets and their duplicates were available with him. The witness stated in cross-examination that he could produce the duplicate of the tickets issued on 01.07.1987 though the same were not brought by him on that date.

Upon making of such statements by the witness Ladulal, counsel for the applicants submitted that he wanted to further cross-examine the witness after getting produced the duplicate of the tickets dated 01.07.1987 and thereupon statements of Ladulal NAW-1 were deferred on 10.01.1994. On the next date i.e. 31.01.1994, the statements of Ladulal were completed and it appears that the said witness produced a ticket book that has been placed on record at page C/36. He stated that on 01.07.1987 his brother-in-law Babulal was the conductor of the bus. With reference to the ticket book that has been marked Ex.A/5 at its internal leaf at ticket No.2385, the witness stated that only on one ticket the year '1987' was mentioned and other tickets were carrying only the date and the month as per practice. According to him,on

30.06.1987 this bus started from Begun for Bhilwara at about 4.30 p.m.; that no other bus was going in replacement of the said bus; that Begun was 72 kms. from Bhilwara and the journey was of about 4 hours. He has denied the suggestion about the bus taking a marriage party in the evening of 01.07.1987 and has also denied the suggestion that there was no enmity in the Baheti and Gagrani family of Paroli. According to him, whenever he was visiting Paroli, Baheli family were not talking to him and hence he stated that they were carrying enmity with him.

On 05.02.1994 two more witnesses were examined on behalf of the non-applicants. NAW-2 Bhagwati Prasad deposed about himself being the President of the Association of transporters and his own bus also plying on the same Bhilwara-Begun route; that there were 6 buses plying on the route in the year 1987 and bus RSE 1529 was one of them. According to this witness, in the month of August, 1987 Ladulal informed that his vehicle was seized by the police with reference to an alleged accident of 01.07.1987. According to him, no accident occurred from the bus RSE 1529 else he would have received information that very date upon any such occurrence. He has further stated that the buses plying on the route were not going anywhere else and if at all going, they would take a permit therefor; that the bus could not have

taken to any other route because of the timing compulsions and the association imposing a penalty of Rs.500/-. In cross-examination, Bhagwati Prasad Ojha has stated that in the year 1987 buses plying on the said route were of course contracting carriage of marriage parties but only occasionally; and that for such carriage of marriage parties, there was no necessity of his permission; that there were 4 timings of the buses in the year 1987 on the said route comprising of 4 for starting from Begun and 4 for starting from Bhilwara that were decided by RTA; some of the buses were doing single trip and some were on the return trip and one bus was always in spare; if a bus in its spare time travelled to other place and then started on its regular timing, there was no prohibition therefor but this much time was not available and the association was imposing fine. He has given out the timings of the year 1987 from Bhilwara and from Begun but has denied knowledge about exact rotation of every vehicle and stated that rotation chart was decided in a meeting whose minutes were drawn but such record was not available for being not preserved beyond a year. He has given distance of Paroli from Bhilwara at about 45-50 kms. and likely speed of the bus at 40 kms. per hour and has given out the number of his own bus as RRE 2469.

NAW-3 Babulal has deposed that he was conductor on the bus RSE 1529 from the year 1985-86 plying on Bhilwara-Begun route belongng to Kaushalya Devi and managed by Ladulal who was related to him; that the bus started from Begun on 01.07.1987 at 7.15 a.m., reached Bhilwara at 11.15 a.m. and again started for Begun from Bhilwara at 3.15 p.m.; and that he was conductor on the bus at that time. He has denied the bus taking a marriage party on 01.07.1987 to Paroli and stated that the bus did not go anywhere except the route and that at Paroli, relations between Gagrani and Baheti families were not cordial. In cross-examination, this witness has denied his having any licence or badge for a conductor. The Tribunal has made a note on his deposition that he once stated that he was learning the work of conductor of the bus but later on stated that he was working as a conductor. He has denied making false deposition because of relationship with Ladulal and has denied the bus taking marriage party to Paroli or Prabhulal falling from the roof of the bus. He was not aware of the reason for strained relations between the said two families. He has also pointed out that there were 6 buses with 5 timings on the route; timings were decided by RTA and rotation by the Association; that he was not aware of the fact as to at what time the bus started from Begun on 10.07.1987; but on 30.06.1987 it started at 8.30 a.m.

The learned Judge of the Tribunal has travelled through the evidence of the non-applicants and has particularly relied upon the ticket book, treating it marked Ex.5, with a comment that even counsel for the claimants conceded that there was no reason with him to doubt the correctness of the said ticket book. The learned Judge has referred to ticket No.2385 specifically giving out the date of 01.07.1987 and has referred to ticket Nos.2391, 2390 and 2400 stating the destination place in the letters "भी" or "भील"; and, according to learned Judge, the letters undoubtedly refer to " भीलवाड़ा" (Bhilwara) and has, therefore, concluded that the bus RSE 1529 definitely came to Bhilwara from Begun on 01.07.1987 and that it was not probable for the bus to have gone from Bhilwara to Paroli 50 kms., then coming back to Bhilwara 50 kms., then going to Begun 75 kms., and then starting from Begun towards Bhilwara. On the circumstance of want of rotation chart as relied upon by the claimants, the learned Judge observed that the bus was seized about 1 ¾ months later and it was not necessary to retain the timing chart for such a long time. The question on the genuineness of NAW-3 Babulal as conductor of the bus in question has also been rejected by the learned Judge with the observations that though licence and badge were required for a conductor but it was not necessary that cent per cent people were following the law and that there

was no reason to disbelieve the witnesses and particularly the ticket book Ex.5.

Though it has been strenuously relied upon by the non-applicants with reference to the ticket book that the bus in question started from Begun on 01.07.1987; and though the learned Judge of the Tribunal has also considered the same to be a very material piece of evidence with no reason to disbelieve the said document; and though it has been commented that even learned counsel appearing for the claimants also conceded that there was no reason with him to disbelieve the correctness of the said ticket book; however, a bare look at the said ticket book brings out the facts entirely different.

The said ticket book has been read as Exhibit-5 obviously for having been got produced by the claimants though it is marked as Exhibit A/5. The ticket book placed at page C/36 of the record starts from ticket No.1809 and ends at ticket No.2400. Exhibit mark (Ex.A/5) has been made at the internal leaf of this ticket book at ticket No.2385. The significant feature of all the leafs of this ticket book is that at each and every printed counter foil of the tickets, registration number of the bus and the name of the transporter and so also the route have been printed; and such particulars read as under:

"RJE 1529
पवन बस सर्विस
भीलवाड़ा से बेगूं"

The entire case has been contested and FIR has been lodged and even insurance cover (though not got exhibited in evidence by the non-applicants) has been produced in relation to a bus bearing registration No. "RSE 1529" and not "RJE 1529" to which the said ticket book pertains to!

It has nowhere been suggested that 'RJE 1529' was the correct registration number of the bus of the non-applicants nor could be so suggested because it is the case of both the parties that the registration number of the questioned bus was 'RSE 1529'. It has not even been remotely suggested in evidence that this ticket book of the bus RJE 1529 was in fact related to the bus RSE 1529.

Then, this ticket book relates to a bus of "Pawan Bus Service". It is nowhere available in evidence that "Pawan Bus Service" relates or refers to the non-applicants Kaushalya Devi or Ladulal.

Then, the ticket book relates to the tickets from "Bhilwara to Begun" and not from "Begun to Bhilwara". The inference drawn by the learned Judge that the letters "भी" or "भील" were of reference to the destination of Bhilwara is rather too far stretched; but for the sake of arguments even if it be assumed that such inference could be drawn by

stretching of conjectures, yet the fundamental fact that this ticket book does not at all relate to bus RSE 1529 has totally been omitted from consideration by the learned Judge of the Tribunal. This perversity strikes at the bottom of the entire consideration.

It is also required to be noticed that though the witness Babulal NAW-3, the alleged conductor on the bus in question, was examined on 05.02.1994, that is after the said ticket book had already been produced by the non-applicant Ladulal on 31.01.1994 but not a single word has been stated by the said witness Babulal about his having issued tickets on the said bus RSE 1529 under the said ticket book Ex.A/5. Significantly, in the entire deposition of Babulal, the said ticket book has not even remotely been referred. If at all tickets were issued from the said ticket book by the conductor Babulal on the relevant date on the bus in question, RSE 1529, there was no reason for him to have not stated so in his deposition.

This Court is clearly of opinion that the said ticket book (marked as Ex.A/5 and read as Ex.5) was produced before the Tribunal only as a pretence, in concealment of material facts, and only in order to mislead. Unfortunately, the Tribunal seems to have gone by the identity of numerals '1529' without considering the difference of series in english letters,

i.e., 'RJE' and 'RSE'. The alleged ticket book can never be accepted as a proof of the fact that bus in question 'RSE 1529' started from Begun on 01.07.1987 at 7.15 a.m.

Then, it is relevant to notice that there is a serious discrepancy in the evidence of the non-applicants about the numbers of vehicle plying on Bhilwara-Begun route. Ladulal stated such number to be 10 whereas President of the Association stated such number to be 6.

Further, the President of Association NAW-2 Bhagwati Prasad Ojha admitted the fact that a bus could have been hired for the purpose of taking a marriage party and no permission was needed from him; and that a bus could have used its spare time to go to other place though, according to him, it was required to adhere to its timings and that such spare time was not left. Distance between Bhilwara and Paroli being of about 45 kms. only, a bus otherwise plying on its scheduled route using its spare time for a journey to and fro Bhilwara-Paroli is a proposition not entirely impossible.

Having examined the evidence produced by the non-applicants, this Court is clearly of opinion that non-applicants have failed to establish the fundamental fact asserted by them that the bus in question was not even available to carry a marriage party from Bhilwara to Paroli.

Apart from rejection of suggestion made by he non-applicants with reference to the very evidence produced by them, there are strong reasons to draw adverse inference against the non-applicants; one, for non-production of the relevant ticket book; and second, for withholding of a most relevant witness in this case, namely, the driver of the bus. Admittedly, the driver Udai Singh was being prosecuted in relation to the accident in question. Though it appears from the record that the claim case was conducted on behalf of the claimants in a rather cursory manner and even the name of the driver was not stated in paragraph 9(2) of the claim application and all the relevant medical evidence was not got summoned from the concerned hospital but for that matter, the non-applicants cannot be absolved of their liability to have produced the relevant witness, i.e. the driver Udai Singh, in evidence. The non-applicants in this vehicular accident case cannot be acceded latitude to rely upon the absract doctrine of onus of proof so as to withhold best and relevant evidence. Then, even the owner of the bus, non-applicant No.1 Kaushalya Devi has not been produced in evidence and the authority extended by her to Ladulal for dealing with the vehicle has also not been produced. Cumulative effect of the evidence as adduced by the non-applicants and as withheld by them is that entire story based on total denial of involvement of

the bus in question, so strongly suggested in the reply, falls to the ground.

Once the version of the non-applicants is rejected as incorrect, there appears no reason to disbelieve the deposition of Kailash Chandra Baheti, AW-4 and so also of Motilal, AW-2 and the basic facts though proved by weak evidence, nevertheless stand established against the non-applicants.

The learned Judge of the Tribunal has criticized the conduct of the proceedings by the ASI, Motilal AW-2 who registered the first information report only on 13.08.1987 although having received information about accidental death of Prabhulal on 09.07.1987 and even having started investigation before lodging the FIR. It is of course true that the manner of conducting of the proceedings by ASI Motilal might give rise to some questions about the procedure adopted by him but the fact that ASI Motilal had taken over the matter specifically appears from the post-mortem report Ex.1 that states that the body was brought by ASI Motilal, P.S City Kotwali, Bhilwara. The post-mortem report also states that the patient was admitted in Orthopedic Ward of M.G.H. Hospital on 01.07.1987 and even details of his X-ray plate numbers have been given bearing the date of 01.07.1987. Motilal has pointed out that the information was duly entered in the daily diary and it is clear that the post-mortem was conducted at his

instance. It appears that the FIR having not been lodged immediately on 01.07.1987 and the facts about the vehicle involved in the accident being not clear, Motilal proceeded to get the FIR registered only after ascertaining the facts. Even if there had been any irregularity on the part of ASI Motilal in complying with the procedural requirements, the other relevant facts available on record cannot be ignored that it did appear in his investigation that Prabhulal sustained injuries from the use of the bus RSE 1529.

Moreover, for procedural irregularity, if any, the claimants are not to be blamed. It is borne out from the record that Prabhulal's parents about 75+ years in age were living at Dariba and Prabhulal was working as a photographer at Bhilwara and had four minor children, the eldest daughter being 15 years in age. He had suffered serious head injury and so also fracture of vertebral column and battled for life for about 8 days before giving in. In that scenario, the claimants cannot be non-suited only because a timely FIR was not lodged by the persons concerned. In any case, the said ASI Motilal got registered the FIR by himself on 13.08.1987 after the basic facts came to surface in the statements of Kailash Chandra Baheti and were ascertained by him. No reason worth the name has been assigned as to why the said ASI

Motilal would at all be interested in roping in a particular bus RSE 1529 in this case?

The learned Judge has further proceeded to raise questions for the relevant record having not been got summoned from the hospital in question. This Court is of opinion that such shortcomings in the case of the claimants has unnecessarily been given undue importance. The fact that Prabhulal was admitted to the hospital on 01.07.1987 is borne out from the post-mortem report itself. If the duty doctor had not called the medical jurist or if the medical jurist had not summoned the police; and for that matter even if it be assumed that persons getting the victim admitted to hospital had not given details of the vehicle he fell from, that by itself cannot be the end of the matter for the claimants. Such shortcomings, whatever, had been on the part of the persons who either took the victim to hospital or attending the medical officers.

Once the basic facts stand proved in the testimony of Kailash Chandra Baheti, AW-4 and then the case of the non-applicants is found to be not only pretentious but polluted by their attempt at misleading by filing an irrelevant ticket book and then for their withholding of the relevant witness i.e., driver of the vehicle, this Court is of opinion that preponderance of probabilities lean in favour of

the claimants and in favour of the finding that Prabhulal was travelling on the roof of the bus RSE 1529 and had a fall wherefrom for being struck by a 'Babool' tree. Learned counsel for the insurer submitted that ordinarily 'Babool' tree cannot be believed to be having a height over and above a bus and then of its branches hanging on the road. The submission based only on supposition cannot be accepted. It has been given out in the site inspection memo Ex.3 and the site plan Ex.4 that there was a 'Babool' tree available at the site whose branches at about 10-11 ft. height were projecting on the road. The possibility of incident occurring in the manner suggested by the claimants cannot be ruled out.

It is also relevant to notice that although the non-applicants No.1 and 2 took so strongly the defence of non-involvement of the vehicle yet, the insurer consciously chose not to take such stance and suggested Prabhulal sustaining injuries for his own negligence by travelling from the roof of the bus.

It may also be observed that a suggestion has been made in the cross-examination of Kailash Chandra AW-4 and so also in the testimony of Ladulal NAW-1 and Babulal NAW-3 that relations between the families of the witness Kailash Chandra and in-laws of Ladulal were not cordial at Paroli. This suggestion is as spineless as irrelevant for the purpose of the

present claim for compensation on account of accidental death of Prabhulal Vaishnav. It cannot be assumed that for such alleged want of cordiality between the family of the marriage party and in-laws of the manager of the bus, the bus could never be lent on hire; and that the dependents of the victim who had no connection with the said families would be interested in making the claim against Kaushalya Devi and Ladulal. Further, the observations as made by the learned Judge with reference to non-production of father and uncle of the witness Kailash Chandra in evidence do not appear to be of relevant consideration because in the vehicular accident claim case, standard and nature of proof cannot be taken to the level of proof requisite for substantiating a criminal charge; and the claimants cannot be faulted for not producing further corroborative evidence with reference to the statement of their witness Kailash Chandra. It is only the reasonable preponderance of probabilities that is required to be considered and not as if searching for complete chain of circumstantial evidence. When basic facts have been established in the evidence led by the claimants and then the case set up by the non-applicants has been found untrustworthy, preponderance leans in favour of the claimants and this court has no hesitation in concluding that the accident did occur from the bus in question; and Prabhulal had

a fall from the bus RSE 1529 and sustained injuries that ultimately proved fatal.

Of course when the deceased was traveling on the roof of the bus, some part of his contribution to the accident and injuries could have been considered; but when the non-applicants have denied the involvement of their bus altogether and such assertion is not accepted, this court is of opinion that in the fact situation of the present case, the non-applicants alone are to be blamed for their driver and conductor permitting roof-top traveling and then for the driver having not taken care to steer the bus clear of the tree branches particularly when passengers were there atop the roof.

It may be observed that the decisions relied upon by the learned counsel for the parties dealing with the questions of identity of the vehicle involved in the accident essentially proceeding on their own facts need no dilatation herein as the present case has been considered and dealt with on its own facts. However, it may be pointed out for the cases relied upon by the learned counsel for the insurer that so far the decision of the Hon'ble Delhi High Court in Om Prakash Nayar's case is concerned, it is borne out from the fact situation therein that the court found the eye-witnesses produced by the claimants to be chance witnesses and then

the eye-witness who accompanied the victim to the hospital was not produced and it was found that the claimant withheld the best evidence. As noticed above, in the present case rather the non-applicants have withheld the best evidence available with them. Further, in the decision of the Hon'ble Madhya Pradesh High Court in Kamlesh (supra) it was noticed that no number of the vehicle was mentioned in the FIR and it was found that the identity of the vehicle was not proved. The Hon'ble Court has proceeded to dismiss the appeals filed by the claimants against rejection of their claim applications by the Tribunal, inter alia, on the consideration that in view of not depositing of the amount under proviso to Section 173 of the Act, the appeals were not even maintainable. With respect, such provision of pre-deposit by a person required to make payment under the award cannot, in the opinion of this Court, be employed in relation to an appeal by the claimant. The decisions relied upon by the learned counsel for the insurer do not help the cause of the non-applicants.

So far the liability of the insurer is concerned, it is noteworthy that no issue has been framed on the alleged limited liability of the insurer; and the insurer consciously choose not to lead any evidence in this case. With the factum of insurance being not in dispute and the insurer having not led primary evidence and even not got the insurance policy

exhibited in evidence there appears no reason to consider that the liability of the insurer was limited to a particular extent. All the non-applicants remain jointly and severally liable for compensation to the claimants for the loss caused to them due to accidental death of Prabhulal.

The Tribunal in this case, after concluding issue No. 1 against the appellants has chosen not to record any finding on issues Nos. 2 and 3 related with quantum of compensation. Having regard to the fact that the present one is an old matter pertaining to the accident of the year 1987, it is considered appropriate to finally decide the matter at this stage itself instead of relegating the parties to the Tribunal for the purpose of quantification of compensation.

Age of the deceased has been given out at 39 years by the claimants and at 40 years in the post-mortem report. He was earning while working as a photographer and his photography business has been taken over by his brother as stated by his father Ram Chandra, AW-3. From the statements of his wife Smt. Sayar it appears that the family is having agricultural income also. Smt. Sayar has further stated that Prabhulal did not leave any capital and was rather in debts. The claimant has asserted household contribution by Prabhulal at about Rs. 3,000/- per month; however, in the claim application his income has been stated at Rs. 2,500/-

per month. No documentary proof of income has been adduced. In the overall circumstances of the case, and looking to the period of incident it appears appropriate to estimate monthly income of the deceased at Rs. 2,000/- per month, i.e. Rs. 24,000/- per annum; and loss of contribution at Rs. 16,000/- per annum after deducting one-third on his personal expenditure. Looking to the age of the deceased at about 40 years and of his wife below 35 years and there being three minor children (60 year old mother and 8 year old son of the victim Prabhulal have expired during trial), it appears appropriate to capitalize by a multiplier of 15 that leads to pecuniary loss at Rs. 2,40,000/-. Each of the present appellants may be allowed Rs. 5,000/- towards non-pecuniary loss leading to addition of further Rs. 25,000/-. Another sum of Rs. 2,000/- deserve to be allowed towards funeral expenses. Total loss for the claimants, therefore, stands at Rs. 2,67,000/- (2,40,000/- + 25,000/- + 2,000/-) and deducting Rs. 15,000/- awarded under no fault liability, the claimants are entitled for compensation in the sum of Rs. 2,52,000/- and there appears no reason to deprive the claimants of this much of compensation minimum in this case.

Having regard to the overall circumstances of the case, this court is of opinion that interest of justice shall be served if

the claimants are awarded interest @ 7.5% per annum from the date of filing of claim application.

As a result of the aforesaid, this appeal succeeds and is allowed. The impugned award dated 23.02.1994 is set aside and the claim application submitted by the appellants-claimants is partly allowed. The claimants are awarded compensation in the sum of Rs.2,67,000/- and after adjustment of Rs.15,000/- received under 'No Fault Liability' shall be entitled to an amount of Rs.2,52,000/-. On the award amount, the claimants shall also be entitled to interest at the rate of 7.5% per annum from the date of filing of claim application.

The amount payable under the award shall be deposited by the respondent-insurer within 30 days from today with the Tribunal. Upon deposit, the Tribunal shall make appropriate orders for apportionment and disbursement. The claimants are also awarded costs of litigation only against the respondents Nos.1 and 2, quantified at Rs.2,200/-.

(DINESH MAHESHWARI),J.

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